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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.977 OF 2007
IN
COMPANY PETITION NO.37 OF 2005
WITH
COMPANY PETITION NO.37 OF 2005

Krunish Engineers & Fabricators Pvt.Ltd. Petitioner

versus

IMP Powers Ltd. Org.Respondent

versus

Pegasus Assets Reconstruction Pvt.Ltd. Applicant

Ms.Motiwala i/by Motiwala & Co. for petitioner.

V.D.Jaisingh for applicant.

C.S.Balsara i/by Sanjay Udeshi & Co. for respondent.

CORAM : A.M.KHANWILKAR, J.

DATE : 13th December 2007

PC :

1. Original petitioner, who has filed the company petition, which has since been admitted in terms of order dated 5th May 2005; and admission thereof has also been published in two local newspapers as well as official gazette in

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September 2005, has applied to this Court for withdrawal of the petition. Before considering that request, the petitioner was called upon to publish the proposed withdrawal of the petition, which I am informed, has been done.

2. The applicant in Company Application No.977 of 2007 has approached this Court for being substituted as petitioner in place of original petitioner on the assertion that the applicant is one of the secured creditor of the respondent company and entitled to recover legal dues to the extent of Rs.625.63 lacs as on 30th June 2005 with further interest till realisation thereof, as claimed by the applicant, from the respondent company. For which reason, the applicant is entitled to prosecute the company petition henceforth in its own rights so as to espouse the cause of other creditors of the respondent company.

3. This application is resisted by the respondent company. Counsel for the respondent company would contend that there is already a dispute pending between the respondent company and the applicant. That is arising in the context of the scheme propounded by the

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respondent company, which was supported by overwhelming majority of other secured creditors of the respondent company, though opposed by the applicant. The said scheme has been approved by this Court. The applicant had approached this Court at the relevant time and his grievance was considered by this Court which is dealt with in the decision dated 29th March 2007 in Company Petition No.395 of 2006. After considering all the aspects of the matter, this Court permitted the applicant to stand outside the scheme propounded by the respondent company and to pursue such other remedy as may be available to the applicant, in particular before the Debts Recovery Tribunal (DRT), for realisation of its dues. The applicant, it is understood, is already prosecuting such remedy before the DRT.. The argument of the respondent company is that in this backdrop, the applicant cannot be heard to be substituted in the present company petition which is pending for consideration for relief of winding up of the respondent company. According to the respondent, the respondent company has sufficient means to meet the liability arising out of the debt payable to the applicant company. It is argued on behalf of respondent company that mere fact that the applicant was treated as

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secured creditor by the respondent company by itself, cannot be the basis to permit substitution of the applicant company as petitioner in the winding up petition. It is argued that this Court will have to examine the claim of the applicant company on its own merits and record a prima facie view that the applicant was not only entitled to pursue the present the petition but would succeed in admission of such company petition for winding up. To buttress the above submissions, reliance is placed on two decisions of Division Bench of our High Court in the case of Ramabai Shriniwas Nadgir Vs. Government of Bombay reported in AIR-1941-Bom-144 and in case of Viral Filaments Ltd. Vs. Indusind Bank Ltd. reported in 2001(4)-Comp.L.J.-44.

4. Having considered the rival submissions, before permitting the original petitioner to withdraw the company petition which is already admitted and advertised, it is necessary to examine the claim of the applicant for being substituted as petitioner. The principle to be applied for considering such request can be culled out from the provisions contained in Rule 101 of the Companies (Court) Rules, 1959. The

same reads thus :-

> RULE 101 :- Substitution of Creditor or Contributory for original petitioner :-
>
> Where a petitioner - (i) is not entitled to present a petition, or
>
> (ii) fails to advertise his petition within time prescribed by these Rules or by order of Court or such extended time as the Court may allow, or
>
> (iii) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or any day to which hearing has been adjourned, or
>
> (iv) if appearing, does not apply for an order in terms of prayer of his petition.
>
> or, where in the opinion of the Court there is other sufficient cause for an order being made under this Rule, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the Court, would have right to present a petition, and who is desirous of prosecuting a petition".
> (emphasis supplied)

5. On plain reading of the aforesaid provision, essentially two parameters will have to be kept in mind before accepting the request of the applicant. Firstly, that the applicant is a creditor or contributory and secondly that the applicant has a right to present a petition and is desirous of prosecuting the company petition.

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Insofar as first aspect is concerned, there can be no difficulty in straight way answering the same against the respondent company. This is so because the respondent company, in the past, has admitted the claim of the applicant as one of the secured creditors. That position can be discerned from the fact that the respondent company had issued notice to the applicant to attend the meeting to consider approval of the scheme propounded by the respondent company, which was meant to be attended by all the secured creditors of the respondent company. Besides, the controversy with regard to that scheme was brought right up to this Court in which this Court has proceeded to consider the point in issue therein on the assumption that the applicant is one of the secured creditors. The fact that the applicant is a secured creditor, was not disputed at all in those proceedings. To get over this position, the counsel for the respondent has relied on the exposition in the case of Ramabai Nadgir (supra). Emphasis was placed on following observations appearing in the said judgement :-

> "... ... A party is not bound by an admission in his pleading except for the

> purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission, but that admission is not binding in any other suit, and certainly not for all time. ... ..."

6. Reliance placed on this decision is completely misplaced; inasmuch as, in the present case, it is not a case of admission by the respondent company of the status of the applicant in the pleadings filed before this Court in some proceedings, but the respondent company has in fact been treating the applicant as one of its secured creditors for which reason it even issued notice to the applicant to attend the meeting of the secured creditors, to consider the proposed scheme propounded by the respondent company. It is not in dispute that the applicant had attended the said meeting and voted against the scheme but was found to be in minuscule minority. That scheme was approved by the other secured creditors and placed for consideration before this Court. As aforesaid, in the said proceedings, although the applicant had appeared and contested the matter, at no stage did the respondent company controvert the status of the applicant that of a secured creditor. All

through out the applicant has been treated as a secured creditor by the respondent company.

7. The next question is whether the applicant being one of the secured creditors of the respondent company is entitled to and has right to present a petition? Insofar as this question is concerned, two fold arguments have been made on behalf of the respondent. The first contention is that even if the applicant has right to present the company petition for winding up, that by itself is not sufficient. The applicant will have to further satisfy the Court that his claim was worthy of acceptance; in that the respondent company was unable to pay the debt of the applicant. For the later issue, the counsel for the respondent company placed reliance on the exposition in the case of Viral Filaments Ltd. (supra) in particular para 19. Emphasis was placed on the following portion of the said judgement which reads thus :-

> "... ... If there is a silver lining, then the dark clouds need not impel the Company Court into admitting the petition for winding up the company. But is there a silver lining at all in the appellant's case is the crucial question. We have already referred to the gist of the affidavit in reply filed to oppose admission of the winding up petition. One would have expected the

> argument to be based on surer foundation. If there was any material presented before the Company Court to indicate that the company's assets for exceeded its liabilities, or that the cash crunch was only a temporary phase, and given a little breathing time, the company would soon come out of straits, the argument could have been considered. After anxiously scanning the affidavit in reply, we find neither any pleading, nor any material particulars which could have satisfied the learned Company Judge on this issue. Thus, the learned Company Judge had nothing but the statutory presumption to fall upon, which he rightly followed up with an order or admission of the petition. Hence, we are unable to say that the learned Company Judge in any way erred in admitting the petition for winding up."

8. This argument clearly overlooks that the stage of admission of company petition is already over. Insofar as original company petition is concerned, that came to be admitted on 5th May 2005. That order has attained finality as it was never challenged by the respondent company. The parameters to be kept in mind for admission of the company petition which are relevant for considering admission of winding up petition, that aspect has already been considered by this Court in the said order. It is well established position that the action of winding-up is not for recovery of dues but for winding-up of the company on the ground that company is unable to

pay its debt. The winding-up petition is admitted for the benefit of all the creditors of the company.

9. For the present application, it is broadly the provisions of Rule 101 that will have to be borne in mind. That requires the Court to examine whether the applicant has right to prosecute a petition. For that, it will have to be seen as to whether the applicant is entitled to claim legal dues from the company exceeding the statutory amount. It is not the respondent's case that the debt payable to the applicant is less than the statutory amount. The fact that the company is unable to pay its debt is already considered by this Court on the earlier occasion when the petition came to be admitted, though a prima facie view. The question as to whether the applicant has a right to present a petition, this will have to be examined in the context of legal requirement as to how the winding-up action can be ignited, such as Section 439 of the Act. As it is held that the applicant is one of the secured creditors, will have a right to present a petition for winding-up in terms of Section 439 of the Act. If the argument of the respondent company that besides examining the fact that the

applicant is a creditor, the Court will also have to keep in mind whether the applicant would succeed in persuading the Court to admit the company petition if it was to be so presented by the applicant, if accepted, would result in re-writing of Rule 101 which is already reproduced in the earlier part of this order. In my view, in the facts of the present case, the stand taken on behalf of respondent company that the applicant has not made out a formidable case for prosecuting the winding-up action as one of the creditors of the respondent company by substituting the original petitioner, cannot be countenanced.

10. According to the respondent, as the applicant is already prosecuting its claim before the appropriate forum i.e. DRT, having chosen to stay out of the scheme propounded by the respondent company, it is not open for the applicant to prosecute the remedy of winding up of the company petition. This submission will have to be stated to be rejected. The fact that the applicant has proceeded to initiate action for recovery of its dues before the DRT cannot preclude the applicant to pursue the present remedy. Atleast, there is no legal provision to

support this position. No legal provision is brought to my notice to buttress this position. The fact that the applicant has now chosen to pursue remedy of winding-up of the respondent company, whether affects the action already instituted by the applicant before DRT, is a matter which will have to be addressed in those proceedings. In my opinion, the objection taken on behalf of the respondent company for accepting the request of the applicant will have to be turned down.

11. Accordingly, the request made by the original petitioner for permission to withdraw the petition is rejected. The original petitioner, however, is permitted to withdraw from the proceedings and in his place the present applicant will stand substituted who would be entitled to prosecute the proceedings on its own merits in accordance with law.

12. Needless to observe that insofar as the justness of the claim regarding the amount due and payable to the applicant company by the respondent company or that the respondent company is unable to pay its debt is concerned, that is a matter which will have to be scrutinized at the

hearing of the company petition.

13. As the main relief of substitution is granted, the applicant is not interested in pursuing the other reliefs claimed in the application for the time being. Insofar as those reliefs are concerned, it will be open to the applicant to take out fresh application if and when occasion arises.

14. It is clarified that the proceedings pending before the DRT between the parties shall be decided on its own merits in accordance with law uninfluenced by any observations made in this order which is only for the limited purpose of considering the relief claimed in the present application.

15. Accordingly, Company Application No.977 of 2007 is disposed off with a direction that the applicant shall stand substituted in place of original petitioner. The applicant shall take steps to carry out necessary amendments in the company petition. That be done within six weeks from today.

16. At this stage counsel for the respondent

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seeks stay of operation of the present order as the respondent may consider taking up the matter in appeal. Although this request is opposed by the counsel for the applicant, in the interest of justice, I am inclined to observe that the order passed today shall not be given effect for a period of six weeks from today.

(A.M.KHANWILKAR, J.)

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Transcription of Judgement
submitted on : 13th December 2007

For approval :

THE HON'BLE MR.JUSTICE A.M.KHANWILKAR)

To be referred to the reporter or not ?

To be shown to the reporters of the
local news-papers or not?